2011 WL 9556425 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

Alden James ARQUETTE, Plaintiff-Appellant/ Cross-Appellee,
v.
STATE OF HAWAII; Stephen H. Levins, Michael J.S. Moriyama, Defendants-Appellees/Cross-Appellants.
and
JOHN DOES, 1-25, Defendants.

No. CAAP10-0000001.
February 9, 2011.

Civil No. 08-1-0118
Appeal and Cross Appeal from;
1) Order Granting Defendants' Motion for Summary Judgment, Filed March 29, 2010;
2) Order Granting Defendants' Second Motion for Summary Judgment, Filed June 30, 2010;
3) Order Grainting Plaintiff's Motion for Review and/or Set Aside Taxation of Cost, Filed August 23, 2010, and
4) Judgment for Defendants State of Hawaii, Stephen H. Levins and Michael J.S. Moriyama, in the
their individual and official capacities, Against Plaintiff Alden James Arquette Filed September 3, 2010
First Circuit Court Honorable Karl K. Sakamoto Judge

Answering Brief of Defendants-Appellees

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*1 STATEMENT OF THE CASE

I. Introduction

Summary Judgment was granted twice in favor of the Appellees by the lower court. Judgment as a matter of law should be affirmed by this Court since there are no genuine issues of material fact that prevent the Appellees from prevailing on all the allegations against them.

The Appellees have presented evidence to show that the Appellant could not prove the three elements of his cause of action for malicious prosecution against the individual Appellees, in their individual capacity. The Appellant has presented no evidence in support of his malicious prosecution allegations such that a genuine issue of fact exists regarding this malicious prosecution claim.

There is no question of material fact that the prior proceeding upon which Appellant's malicious prosecution cause of action is based was not terminated in his favor. Nor is there any evidence that the Appellees initiated the prior proceeding without probable cause or did so with malice. These are the three requisite elements of malicious prosecution. *Young v. Allstate Insurance Co.*, 119 Hawai'i 403, 417, 198 P.3d 666, 680 (2008). The individual Appellees are entitled to judgment as a matter of law on this claim.

The Appellees also presented argument and evidence to show that the Appellees are not liable for the related negligent investigation, hiring, training or supervision claims. Again, the Appellant has presented no evidence sufficient to warrant trial on these negligence claims.

***2** With respect to the claims against the State of Hawaii and the individual defendants in their official capacity, there is no subject matter jurisdiction over the malicious prosecution cause of action. Haw. Rev. Stat. §662-15(4) excepts this intentional tort from the State's waiver of sovereign immunity under the State Tort Liability Act, Haw. Rev. Stat. Chapter 662. The Appellant conceded this in the lower court. Record on Appeal (hereafter "RA"), Docket Entry 19, pp. 352-353, RA 19/352-353.

Because there is no evidence of malice on the part of the individual Appellees, they are also entitled to judgment as a matter of law on the malicious prosecution claim based on the qualified immunity they have as State government employees. *Towse v. State of Hawaii,* 64 Haw. 624, 647 P.2d 696 (1992).

Aside from the fact that there is no evidence to support the negligent supervision claim, it must fail because the undisputed evidence shows that Appellee Moriyama acted within the course and scope of his employment at all times relevant. This negates an essential element of that claim. *Dairy Road Partners v. Island Ins. Co.,* 92 Hawai'i 398, 427, 992 P.2d 93 (2000). The Appellant conceded this fact in the trial court. *See* the transcript (hereafter "Tr") of the March 2, 2010 hearing, p. 24, Tr 3/2/10, p. 24.

The negligent investigation, training and hiring claims must fail because the undisputed evidence shows that there was no negligence in this regard. In addition, there is no legal duty owed by these Appellees-attorneys to the Appellant, their client's adversary. *Myers v. Cohen,* 5 Haw. App. 232, 246, 687 P.2d 6, 16 (1984).

The following Statement of the Case and Argument discuss in detail why the trial court's grant of judgment summary judgment on these claims was proper. Applying the applicable standard of ***3** review, this Court will agree that judgment as a matter of law in favor of the Appellees is warranted.

II. The Complaint; Appellant's Claims

Plaintiff-Appellant/Cross-Appellee Arquette (hereafter "Appellant") filed suit on January 17, 2008, claiming that the Appellees are liable to him for the tort of malicious prosecution. Appellee Stephen H. Levins is the Executive Director of the State of Hawaii's Office of Consumer Protection. Michael J.S. Moriyama is a trial attorney on the staff of the Office of Consumer Protection. The Appellant sued Appellees Levins and Moriyama in this action in their official and individual capacities. *See* Complaint at ¶¶ 3 and 4, RA 19/13. That malicious prosecution claim is based on a civil action brought by the State of Hawaii's Office of Consumer Protection (OCP) against the Appellant and others in July 2004. *See* Complaint ¶¶ 26, 32 and 33, RA 19/18.

The Appellant also alleged that Appellee Moriyama negligently failed to sufficiently investigate the claims made against the Appellant in that prior civil action. Appellant claimed that Appellee Moriyama's alleged negligent investigation amounted to a "breach of DEFENDANTS' duty of care in the exercise of their statutory authority." *See* Complaint at ¶37, RA 19/20.

For his third cause of action, the Appellant claimed that Appellees State of Hawaii and Levins negligently failed to train and supervise staff attorney Moriyama. *See* ¶ 39, RA 19/20.

A. The Prior Proceeding Upon Which This Case Is Based.

To help understand the proceedings in the trial court, the following discussion of the prior proceeding upon which the malicious prosecution claim is based is provided. The lawsuit filed by the Office of Consumer Protection (OCP) in July 2004, which is

the basis for Appellant's claims of malicious ***4** prosecution and negligence in this case, sought to protect **elderly** members of the public in Hawaii from being victimized by a scheme to sell to those **elderly** persons long term deferred annuities.

In that prior proceeding, the OCP alleged generally that the Appellant and others committed unfair and deceptive acts and practices and other violations of the law incident to their scheme of selling long term deferred annuities to **elderly** persons. As a result of these unlawful practices, it was alleged that these **elderly** persons were purchasing annuities without being properly advised of their terms, including provisions for early withdrawal penalties and long delayed pay out features under which these **elderly** may never benefit due to their age. That OCP Complaint is attached as Exhibit "1" to Michael Moriyama's Declaration made in support of Defendants-Appellees' first Motion for Summary Judgment. RA 19/195-248. *See* Moriyama Declaration at RA 19/175-194, particularly ¶¶ 10 and 29 of that Declaration beginning at RA 19/178.

The Office of Consumer Protection's investigation and the other investigations conducted by two other offices within the Department of Commerce and Consumer Affairs regarding this scheme had been ongoing for over two years before the filing of that OCP Complaint. Those investigations provided the factual bases for the allegations of that OCP Complaint. See Michael Moriyama's Declaration ¶¶ 5, 10, 22, 24 and 26 at RA 19/176-186.

Those investigations determined that hundreds of **elderly** may have been victims of this scheme. A sample from this large number of potential witnesses was selected for investigation by OCP so that the number of persons was manageable. Throughout the investigation and while litigation was underway, potential witnesses were being added and dropped due to age, medical ***5** reasons and the results of discovery and further investigation. See Declaration of Moriyama, ¶¶ 9-18, RA 19/175-183.

The investigations showed that each of the several individuals involved in this scheme had specific roles to play, but the pattern and sequence of conduct was similar in many instances. The Appellant played the role of a "paralegal" assisting Rodwin Wong, an estate planning attorney who was in contact with these **elderly** persons ostensibly for legal estate planning services. *Id. See also* ¶¶ 23 and 29 of Moriyama Declaration, RA 19/184-185, 188.

In order to determine the financial wherewithal of prospective purchasers of these annuities, the Appellant and others portrayed themselves as "paralegals" working for Rodwin Wong. They met with these **elderly** persons and obtained specific financial information from them. *Id.* This personal financial information then found its way into the hands of other insurance agents.

If the consumers had sufficient assets, the insurance sales persons employed by an insurance sales company owned by Honolulu insurance man, Dan Fox, would then follow the initial "paralegal" visit with a sales call designed to sell the consumer long term deferred annuities. When these sales calls were made, the consumers reported that the insurance sales person already had the personal financial information that had been gathered by the Appellant or other "paralegal" supposedly for attorney Wong's use in providing legal services. RA 19/178-194, particularly ¶¶ 10 and 29 of Moriyama's Declaration.

A specific example of the facts determined to exist prior to the filing of that OCP action that support the allegations of unfair or deceptive practices by the Appellant, and which confirmed his role in this operation, was his use of his "paralegal" business cards and other documents in his dealings ***6** with consumers. Those business cards and documents obtained by OCP identify the Appellant as a "paralegal" for attorney Rodwin Wong, but the address and phone numbers listed are, in fact, those of the insurance sales company owned and managed by Dan Fox under whom Appellant held his insurance sales license. *See* ¶ 10 of the Moriyama's Declaration at RA 21/296. *See also* the Declaration of Moriyama, ¶¶ 26, 33, 35 at RA 19/175, 186, 192, Exhibits 16, 19 and 23 at RA 19/281 and 289. [1]

B. The Appellees' First Motion For Summary Judgment.

The Appellees filed a Motion For Summary Judgment on December 24, 2009. RA 19/149. That motion contended that the Appellees were entitled to judgment as a matter of law for several reasons. First it was argued that, as a matter of law, the Appellant could not maintain an action for malicious prosecution against the State and its employees, in their official capacity,

because the State has not waived its sovereign immunity for such intentional torts. Haw. Rev. Stat. § 662-15(4). RA 19/157-158. This was conceded by the Appellant in the trial court. [2] *See* Tr 3/2/10, p. 3.

Second, it was argued that there were no genuine issues of fact concerning Appellee Moriyama's probable cause to *initiate* the 2004 OCP action against the Appellant and no evidence of malice on his part in doing so. Proof of these facts negate two ***7** of the three elements of a cause of action for malicious prosecution. RA 19/158-163. [3]

Third, Appellees argued that, because there was insufficient evidence to create a genuine issue of material fact regarding the fact that Appellees Moriyama and Levins lacked malice, these Appellees, in their individual capacities, were also entitled to summary judgment on the malicious prosecution claim based on their qualified immunity as State officials. RA 19/162-165. *Towse v. State of Hawaii*, 64 Haw. 624, 647 P.2d 696 (1992).

That motion also presented argument, with supporting evidence, that showed there was no actionable negligence in the conduct of Mr. Moriyama's investigation and no actionable negligence by Mr. Levins or the State in their supervision and training of Appellee Moriyama. [4] This lack of any actionable negligence is based on the lack of any relevant evidence to support the negligence allegations as well as the lack of any legal duty owed to the Appellant by any of the Appellees. RA 19/165-174.

***8** The Appellees limited their evidence and arguments in that Motion for Summary Judgment, and at the hearing on that motion, to the period of time leading up to, and including, the initiation of the Office of Consumer Protection lawsuit. *See* fn 4, p.7, RA 19/161; *See also* Tr 3/2/2010, p. 17. The reason for limiting the evidence and argument to that period of time is because that is the only time to consider in determining whether the tort of malicious prosecution, as it is defined in Hawaii, can be established. *Young v. Allstate Insurance Co.*, 119 Hawaii 403, 417, 198 P.3d 666, 680 (2008); *See* Tr 3/2/2010, p. 17.

That is, the tort of malicious prosecution in Hawaii is defined by its three elements as; (1) the prior proceedings must be proven to have terminated in the plaintiff's favor, (2) those prior proceedings must have been initiated without probable cause, and (3) those prior proceedings were *initiated* with malice. *Id.; Brodie v. Hawaii Automobile Retail Gasoline Dealers Association*, 2 Haw. App. 316, 631 P.2d 600 (1981). For a malicious prosecution claim to be established, the Plaintiff must produce specific and extrinsic evidence that malice existed at the *initiation* of the prior proceedings. *Myers v. Cohen*, 5 Haw. App. 232, 237, 687 P.2d 6, 11 (1984).

The Appellant filed his Memorandum In Opposition To Defendants State of Hawaii, Stephen H. Levins, and Michael J.S. Moriyama's, individually and in their official capacities, Motion For Summary Judgment on February 27, 2010. RA 19/347. The Appellant argued that there was a lack of probable cause at the initiation of that action because no specific consumers were named in the OCP Complaint and there was no evidence in that OCP action that showed that the Appellant was personally involved in the actual sales transactions of the annuities. RA 19/351

Appellant presented the affidavit of Keith Matsuoka, the Appellant's counsel during that prior OCP case, in his attempt to ***9** show there was a question of fact regarding Appellee Moriyama's alleged malice. RA 19/367-371. Mr. Matsuoka asserted in that affidavit that, *after* the initiation of the prior OCP proceeding, he perceived that Appellee Moriyama held personal animus against the Appellant because Appellee Moriyama characterized the Appellant's conduct as egregious while arguing a matter in court. RA 19/370. This speculation on the part of Mr. Matsuoka concerning Appellee Moriyama's animus is not admissible since it is irrelevant in time and speculative. Tr 3/2/2010, p. 19.

The Appellant also presented affidavits of some of the consumers that the OCP investigation determined had had dealings with the Appellant and which were disclosed in discovery responses *after* the OCP action was initiated. In those affidavits, those consumers indicated that they were satisfied with their insurance products and/or not interested in acting as witnesses for the Office of Consumer Protection in that case. The Appellant did not address the fact that other consumers had filed complaints. RA 19/355, 481-483.

In his opposition to that motion, the Appellant provided no rebuttal to the facts that he had provided business cards and used documents that contained false information about where and for whom he really worked. This alone is sufficient to provide probable cause that the Appellant committed a "deceptive" act. *Courbat v. Dahana Ranch, Inc.*, 111 Hawai'i 254, 262, 141 P.3d 427, 435 (2006).

The hearing on the Appellees' first Motion for Summary Judgment was held on March 2, 2010. The trial court found that there were no genuine issues of material fact regarding the fact that the 2004 OCP complaint was supported by probable cause and that Mr. Moriyama was not motivated by malice at the initiation of the OCP lawsuit. Tr 3/2/10, p. 25. The Court also found that summary judgment in favor of the Appellees on the claims of ***10** negligent investigation by Appellee Moriyama and negligence on the part of Appellees Levins and the State was proper. Tr 3/2/10, pp. 29-30. [5]

After the Court orally granted the Defendants' motion at the hearing of March 2, 2010, counsel for Plaintiff argued that *"we've alleged claims that this case was maintained without any evidence."* (Emphasis added.) Tr 3/2/10, p. 30. [7] In response, the trial court opined that the Defendants' motion did not sufficiently brief what may have occurred *during* the OCP lawsuit. The trial court stated that "as far as the initiation of prosecution, that was what was brought, and that was what the court ruled on." Tr 3/2/10, pp.30-31.

The trial Court adopted the order proposed by the Appellant's counsel in which it states that summary judgment is ***11** granted in favor of the Appellees on all causes of action "only as to the initiation of the action against Plaintiff; and "[t]his Order does not affect Plaintiff's claims of malicious prosecution, negligent investigation, and negligent supervision arising from the *maintenance* of the action against Plaintiff in Civil No. 04-1-1317 VSM as those claims were not raised or briefed in the instant motion." RA 19/543-544. (Emphasis added.)

C. The Appellees' Second Motion For Summary Judgment.

The Appellees' Second Motion For Summary Judgment was filed on April 12, 2010. RA 21/8-218. The Appellees again argued that there can be no malicious prosecution in the *maintenance* of an action under Hawaii's definition of malicious prosecution. RA 21/20-21. Appellees argued that summary judgment on all claims was warranted particularly in view of the law of the case established by the trial Court's findings and rulings on the Defendants' first Motion for Summary Judgment. RA 21/18-19, 33, RA 21/436.

The Appellees argued that to expand the definition of malicious prosecution to include the period of time after the initiation of the prior proceeding would expand Hawaii's definition of this judicially disfavored tort to the point of creating a new tort and would be contrary to precedent. RA 21/20-21. Nevertheless, because of the trial court's ruling on the Appellees' first Motion for Summary Judgment, the Appellees provided Declarations and exhibits in their Second Motion For Summary Judgment that established that no Defendant acted with malice or lacked probable cause for continuing to prosecute the lawsuit against the Appellant. RA 21/23-25, 42-65.

In addition, in order to be sure that all remaining allegations by the Appellant were addressed, the Second Motion For Summary Judgment reiterated the reasons why the negligent ***12** investigation and negligent training and supervision claims must be dismissed. RA 21/21-22. The legal defenses of (1) the qualified immunity that these State officials enjoy, (2) a lack of any legal duty owed to the Appellant which supports the application of the litigation privilege in favor of these attorneys-Appellees, and (3) the fact that Appellee Moriyama was acting within the course and scope of his official duties at all times, which negates any claim of negligent supervision, were again asserted. RA 21/23-33.

Finally, for the first time, the Appellees argued in their second Motion For Summary Judgment that judgment in favor of the defendants on the malicious prosecution cause of action was mandated, as a matter of law, because the Appellant could never prove the third element of his claim, i.e., that the prior OCP litigation terminated in the Appellant's favor. RA 21/22-23.

Judgment as a matter of law on this issue was, and is, warranted because it is undisputed that the prior litigation upon which the Appellant bases his claim of malicious prosecution ended by the filing of a stipulation to dismiss that action without prejudice. *See* Moriyama Dec. ¶59, RA 21/62; *See* Exhibit 13, RA 21/172-181.

The Appellant filed his Memorandum In Opposition To Defendants' Second Motion For Summary Judgment on June 4, 2010. RA 21/231-429. Appellees filed their Memorandum In Reply on June 10, 2010. RA 21/430-462.

The Appellees' Memorandum in Reply makes clear that the Appellant's argument that there was no evidence of him making any actual sales of annuities misses the point. The OCP action did not even allege that the Appellant's role in this conspiracy to victimize **elderly** citizens was that of the actual seller of the annuities.

It is not necessary that a sale of a product or service actually occur in order for an unfair or deceptive act or ***13** practice to be found. It is sufficient if the act or practice has the capacity or tendency to mislead or deceive. *State by Bronster v. United States Steel Corp.*, 82 Hawaii 32, 51, 919 P.2d 294, 313 (1996); *Courbat. Dahana Ranch, Inc.*, 111 Haw. 254, 262, 141 P.3d 427, 435 (2006) (citing *FTC v. Verity Int'l., Ltd.*, 443 F.3d 48, 63 (2nd Cir. 2006).

The reply to Appellant's opposition also pointed out that the fact that some of the consumers may not be interested in participating as witnesses was irrelevant to the determination of whether there was probable cause. The actual existence and desire of potential witnesses does not govern whether there is sufficient information to institute an action on behalf of the general public. RA 21/435. Haw. Rev. Stat. § 487-5; e.g., *People v. Network Assoc., Inc.*, 195 Misc.2d 384, 387, 758 N.Y.S.2d 466, (Sup. 2003).

The hearing on Defendants' Second Motion For Summary Judgment was held on June 15, 2010. Tr 6/15/10. At said hearing, the trial court granted summary judgment in favor of all Appellees with respect to all claims. Tr 6/15/10, p. 19-21. The Order Granting Defendants' Second Motion For Summary Judgment was filed on June 30, 2010. RA 21/466-468.

STANDARD OF REVIEW

The appellate review of a trial court's grant or denial of summary judgment is a de novo review. *Querubin v. Thronas*, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); *Durette v. Aloha Plastic Recycling, Inc.*, 105 Hawaii 490, 501, 100 P.3d 60, 71 (2004). That is, both the trial court and appellate court on review apply the same standard which is that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show ***14** that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.*

The Hawaii Rules of Civil Procedure require that: When a motion for summary judgment is made..., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Haw. R. Civ. P. 56(e) (2000). Thus, "[a] party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, 'nor is [the party] entitled to a trial on the basis of a hope that [the party] can produce some evidence at that time."' *Henderson v. Prof. Coatings Corp.*, 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (quoting 10A *Charles Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure* § 2727 (2d ed. 1983)).

ARGUMENT

A. Introduction

This Court should affirm the trial court because the record establishes that the Appellees produced sufficient evidence to show that, at all times relevant to the initiation of that 2004 OCP lawsuit, they did not commit malicious prosecution and their investigation of the Appellant and supervision and training of Appellee Moriyama were not negligent.

Furthermore affirming summary judgment is justified, as a matter of law, because the undisputed evidence produced by the Appellees concerning the stipulated termination of the prior proceeding makes it legally impossible for the Appellant to prevail on his claim of malicious prosecution. This ***15** insurmountable obstacle to Appellant ever succeeding on his malicious prosecution claim was not the specific basis for the trial court's grant of summary judgment. This Court, however, may affirm the trial court's entry of judgment in favor of Appellees on this basis. *McCarthy v. Yempuku*, 5 Haw. App. 45, 52, 678 P.2d 11, 16 (1984); *Tauese v. State Dept. of Labor*, 113 Hawaii 1, 16, 147 P.3d 785 (2006).

Summary judgment is also justified because the Appellant, as the nonmoving party in both motions for summary judgment, failed to meet his burden of producing evidence that was material and sufficient to create a genuine issue of material fact. Appellant produced no material facts to dispute that the Appellees had probable cause for initiating the 2004 OCP lawsuit, and that they did so without malice.

By this Answering Brief, Appellees assert all of the arguments which were made in the lower court. Appellees submit that this Court, applying the rigorous de novo review standard, will reach the same conclusions as the trial court.

B. The Appellees Presented Sufficient Evidence To Warrant Summary Judgment Regarding Malicious Prosecution And The Other Violations of Law Alleged In The Prior OCP Proceeding Against The Appellant.

The Complaint filed by the Office of Consumer Protection in July 2004 against eleven identified individuals and corporations contained fifteen counts. The Appellant was named as a defendant in Counts I, II, V, VIII, IX, XII, XIII and XIV. RA 19/195-248

That Complaint alleges under the defendants' "scheme to obtain confidential financial information and sell deferred annuities" (RA 19/199) that the Appellant and others operated under the guise of "paralegals" for an attorney when, in truth, they were operating as part of the scheme to sell annuities for other entities (Count I) and that the Appellant operated under ***16** the guise of estate planning (Count II). These counts are the gravamen of the Complaint for unfair or deceptive acts or practices alleged in violation of "Haw. Rev. Stat. §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f)." RA 19/206 and 211.

The facts regarding the false business cards and documents used by the Appellant have already been discussed. It has already been pointed out that the Appellant has never rebutted the evidence presented by the Appellees in this regard or even attempted to provide an innocent explanation for providing consumers with phone numbers and addresses different than those his ostensible employer, attorney Rodwin Wong, provided to the Hawaii State Bar Association as his place of business. *See*, e.g., Moriyama Dec., ¶ 26, RA 19/186 and Exhibits 12, 19, 20 and 23 at RA 19/273, 281, 282 and 289.

Other facts support the allegations that the Appellant was a participant in this scheme of deceptive acts and demonstrate how intertwined the attorney's business and the sale of insurance products were. Exhibit 15 attached to Appellees' first Motion For Summary Judgment is a letter dated March 4, 2004 from Dan Fox to consumer, Mr. Gamache. This letter was obtained by OCP three months before the filing of the OCP action in 2004.

By that letter, insurance man Dan Fox advised Mr. Gamache that the Appellant was not only no longer a licensed agent with Dan Fox & Associates, but, curiously, also stated that the Appellant is no longer a paralegal for attorney Rodwin Wong. Why the proprietor of an apparently unrelated insurance sales company advised the client of a law firm that the "paralegal" the client has been working with incident to obtaining legal services is no longer employed by that law firm is not explained. Certainly, this is strong evidence that the persons actually selling these inappropriate annuities are connected with attorney Rodwin Wong and, in fact, control or employ that attorney's "paralegals." ***17** This connection with, and apparent control over, "paralegal"

Arquette, of course, was not made clear to these consumers. *See* Moriyama Dec. ¶ 28 and Exhibit 15. RA 19/188 and RA 19/277 respectively.

How Dan Fox had the authority to speak on behalf of attorney Rodwin Wong in that letter is explained by the information provided by Rodwin Wong in the personal interview that Appellee Moriyama had with him prior to the filing of the OCP lawsuit. In that interview, Rodwin Wong admitted that Dan Fox collected all the fees made payable to Rodwin Wong for his estate planning legal services, then Fox paid attorney Wong only a portion of those fees. Rodwin Wong admitted prior to the OCP Complaint being filed that the Appellant and other "paralegals" ostensibly employed by him were, in reality, controlled by Dan Fox. *See* Moriyama Dec., ¶ 24 at RA 19/185.

When the Appellant and other "paralegals" would visit the homes of these **elderly** and collect personal financial information from them on the pretext of helping an attorney provide legal estate planning services, their true status as insurance sales persons licensed under Dan Fox was not disclosed to these consumers. After the Appellant met with one of the consumer couples as Rodwin Wong's "paralegal, they next met with Dan Fox, believing him to also be a representative of their attorney. *See* Dec. of Moriyama, ¶ 23, RA 19/185.

When that first meeting with Dan Fox took place, Dan Fox already had the information concerning their house, property and money which they had previously provided to "paralegal" Arquette for their attorney's use. Nothing was apparently said or done by the Appellant or Fox to dispel that couples' misperception and confusion regarding the true roles these persons played. Moriyama Declaration ¶ 33, RA 19/191.

***18** Surely this conduct by the Appellant has the capacity or tendency to mislead or deceive members of the public sufficient to establish probable cause that a deceptive or unfair act or practice under Haw. Rev. Stat. § 480-2 has occurred. *State by Bronster v. United States Steel Corp.*, 82 Hawaii 32, 51, 919 P.2d 294, 313 (1996); *Courbat v. Dahana Ranch, Inc.*, 111 Haw. 254, 262, 141 P.3d 427, 435 (2006) (citing *FTC v. Verity Int'l., Ltd.*, 443 F.3d 48, 63 (2nd Cir. 2006).

In Count V Appellant was alleged to have failed to provide legally required information regarding replacement insurance or annuity contracts; Count VIII alleged that Appellant misrepresented the suitability and/or appropriateness of selling securities and purchasing deferred annuities; Count IX alleged that Appellant engaged in unlicensed securities transactions; Count XII alleged that Appellant engaged in investment adviser activities without a license; Count XIII alleged that Appellant engaged in unlawful high pressure sales tactics; and Count XIV alleged, as an aggravating circumstance, that the scheme in which the Appellant and others were involved targeted the **elderly**. RA 19/195-248.

These allegations all arise out of the pattern of dealings that the Appellant had with consumers as told to Appellee Moriyama and the State's investigators by those consumers throughout the years of investigation that preceded the filing of that OCP action in 2004. Appellee Moriyama learned through his work with the Securities Enforcement Branch and Insurance Division of the Department of Commerce and Consumer Affairs, as well as from his attendance at seminars, that the Appellant did not comply with these regulatory requirements applicable to replacement insurance and the sale of securities.

For example, Appellee Moriyama learned that when securities were liquidated by these **elderly** consumers in order to purchase ***19** these long term deferred annuities, no suitability analyses were conducted by the Appellant. None of the participants in this scheme, including the Appellant, advised these consumers regarding what may or may not have been appropriate for them in their circumstances. *See*, e.g., Moriyama Dec. ¶¶ 5, 9, 18, 22, 25, 30, 32 and 37, RA 19/176-194. *See also* the partial transcript of Appellee Moriyama's deposition attached to Appellees' first motion for summary judgment as Exhibit "A", at pp. 23-35, 44, 51-59, RA 19/314-320, 326, 330-336 respectively.

These failures to advise consumers of the suitability of selling securities and purchasing these long term annuities constitutes a violation of Hawaii Administrative Rules governing insurance and securities sales and violates the standards of conduct established by the National Association of Security Dealers.[8] Again, the fact that the Appellant may not have personally

participated in the actual sales transaction is not a defense under the theory that all of the participants in that scheme were responsible for the acts of all others.

Although the focus is on the time an action is initiated, the Appellant himself brought to the trial court's attention the fact that the trial court in that prior OCP action partially granted and denied the Appellant's motion for summary judgment. *See* Exhibit D attached to Appellant's Memorandum In Opposition to Appellees' first Motion for Summary Judgment, RA 19/433-435. The Appellant now directs this Court's attention to that same ruling made by that trial court eighteen months after the OCP case was initiated. *See* Appellant's Opening Brief, p. 4, RA 34/10.

Since the Appellant has "opened the door" by referring to matters occurring after the initiation of the OCP action, i.e., the trial court's ruling on the motion for summary judgment, the

***20** ppellees also direct this Court's attention to that ruling. It supports the Appellees' position in this case.

After hearing the evidence in that motion by the Appellant in that OCP case, it is telling that that trial court in the prior proceeding denied Appellant's motion for summary judgment with respect to each and every one of the counts in the OCP Complaint that alleges wrongdoing by the Appellant. The only counts upon which that court granted summary judgment in favor of the Appellant were those counts that did not pertain to him. Compare the OCP Complaint attached as Exhibit "1" to Moriyama Declaration at RA 19/195-249 with the Order denying Appellant's motion as to "Counts 1, 2, 5, 8, 9, 12, 13, and 14."

It is clear from the denial of Appellant's motion that the trial court determined there was sufficient evidence to support the OCP's allegations against the Appellant. RA at 19/435.[9] That is, in order for that trial court to have denied the Appellant's motion for summary judgment, it must have determined that there was at least sufficient evidence to create genuine issues of material fact as to each and every one of the claims that the Office of Consumer Protection alleged against the Appellant in that prior proceeding. This is evidence of, if not a binding court ruling in this case, that there was factual support for OCP's claims against the Appellant. *See*, e.g., *Kaleikini v. Thielen*, 124 Hawai'i 1, 5, 237 P.3d 1067, 1071 (2010) ("We recognize,... that, although 'a [c]ourt may take judicial notice of each document in the [c]ourt's file, it may.take judicial notice of [only] the truth of facts asserted in documents[,] such as orders, judgments[,] and findings of fact [FOFs] and [conclusions ***21** of law] because of principles of collateral estoppel, res judicata, and the law of the case.' (citations omitted)). *Id.*

In summary, there was sufficient information known to the Office of Consumer Protection to "reasonably believe in the existence of the facts upon which the claim is based, and... correctly or reasonably believes that under those facts the claim may be valid under the applicable law..." *Brodie v. Hawaii Automotive Retail Gasoline Dealers Associatiion, Inc.*, 2 Haw. App. 316, 318, 631 P.2d 600, 603 (1981). This is the standard for determining whether probable cause exists for the filing of a civil action. *Id.*

C. The Appellant Cannot Prove That The Prior Proceeding Terminated In His Favor.

It is undisputed that the OCP action against the Appellant ended by the filing of a Stipulation For Dismissal Without Prejudice As To The Balance Of All Claims As Against Defendant Alden James Arquette on June 26, 2006. *See* Exhibit 13 attached to Appellees' Second Motion For Summary Judgment, RA 21/172-180 and Exhibit G attached to Appellant's Memorandum In Opposition To Appellees' first Motion For Summary Judgment at RA 19/441-449.

The Appellant argues that a voluntary dismissal of a prior proceeding may give rise to an inference that there was a lack of probable cause. Opening Brief, p. 13, RA 34/19, relying on *Brodie v. Hawaii Automotive Retail Gasoline Dealers, Inc.*, 2 Haw. App. 316, 321 (1981). There this Court said in dicta;

> Here, the prior lawsuit terminated not because the court below found no claim for relief had been stated nor because the appellees failed to prove their case but because they failed diligently to prosecute it. The case is really very similar to those in which there has been a voluntary dismissal of the prior lawsuit. It seems

> to us that failure to prosecute, ***22** like voluntary dismissal, *may* give rise to an *inference* that there was a lack of probable cause. But we do not see how that inference can reasonably permit a further inference that there was malice in instituting the case in the first place. *Id.* (Emphasis added.)

Appellees point out that when the case law refers to a "voluntary dismissal" of the prior proceeding as being sufficient to infer that there was a lack of probable cause, that case law refers to situations in which a plaintiff *unilaterally* dismisses an action. Under those circumstances, it is viewed as similar to a dismissal based on failure to prosecute. *See,* e.g., *Villa v. Cole,* 4 Cal.App. 4th 1327, 1335, 6 Cal. Rptr. 2d 644 (1992) and the authorities cited therein.

In the present case all the parties agreed to dismiss the Appellant. The same inference that this method of dismissal amounts to an admission that there is insufficient evidence to initiate the action does not logically flow from the fact that multiple parties agreed to end the litigation against the Appellant without prejudice. The reliance on *Brodie* that this situation may give rise to an inference of a lack of probable cause is misplaced.

What's more, the Appellant's reliance on this language from *Brodie* does him no good under the circumstances of this case since whatever inference may have arisen is clearly rebutted by the actual facts and circumstances surrounding that stipulation to dismiss, evidence of which has been made part of the record by the Appellees. First, of course, the admissible evidence regarding the facts that were known to OCP's investigators and attorneys shows that there was sufficient information to establish probable cause at the initiation of that case. This did not change throughout the pendency of that action.

***23** Appellee Moriyama testifies in his Declaration in support of Appellees' Second Motion for Summary Judgment that nothing occurred after the initiation of the prior proceeding to make OCP believe its allegations were not supported. Of particular relevance to the Appellant's argument are the facts that Appellee Moriyama describes with respect to OCP's reasons for agreeing to dismiss Appellant from that case. RA 21/42-65

Beginning at paragraph 59 of that Declaration, Appellee Moriyama explains that the mediator and the OCP were concerned that continuing the litigation against the Appellant, who had been expelled from the mediation, could have generated cross-claims being filed by the Appellant against the other defendants whose settlements were pending. RA 21/62. There was concern that continuing the litigation against only the Appellant would jeopardize those pending settlements. RA 21/64 at ¶ 64.

Surely, any inference that the OCP action was dismissed for insufficient evidence is rebutted by these facts. Appellee Moriyama's Declaration establishes that the prior proceeding was terminated for reasons that had nothing to do with any claimed lack of evidence against the Appellant at its initiation.

Appellees' evidence concerning this stipulated termination of the prior proceeding establishes that, as between the Office of Consumer Protection and the Appellant, there was no winner. The termination of that proceeding was not in favor of either.

This Court stated in *Brodie;*

> We do not wish to open the door to a second lawsuit being filed by the defendant every time the plaintiff loses a previous lawsuit, followed, we suppose, by a third lawsuit if the plaintiff in the second lawsuit loses that one and so on *ad infinitum. Brodie v. Hawaii Automotive Retail Gasoline Dealers Association, Inc.,* 2 Haw. App. 316, 321, 631 P.2d 600, 604 (1981).

***24** The termination of the prior proceeding in this case is exactly the kind of equivocal termination of a prior proceeding that cannot satisfy the "terminated in favor of plaintiff" element of a malicious prosecution action. This case is a prime example of the type of lawsuit that the requirement to prove that the prior litigation terminated in a plaintiff's favor is intended to prevent from being filed. *Wong v. Panis,* 7 Haw. App. 414, 772 P.2d 695 (1989); *Jaress & Leong v. Burt,* 150 F. Supp. 2d 1058 (D.

Haw., 2001) (Diversity action applying Hawaii law); *Haight v. Handweiler,* 199 Cal. App. 3d 85, 244 Cal. Rptr. 488, 489 (1988); *Villa v. Cole,* 4 Cal.App. 4th 1327, 6 Cal. Rptr. 2d 644, 649 (1992) (When case dismissed to effectuate a settlement or simply to voluntarily put an end to the litigation, "the dismissal reflects ambiguously on the merits of the action *as it results from the joint action of the parties,* thus leaving open the question of defendant's guilt or innocence." After all, the "purpose of a settlement is to avoid a determination on the merits.") (Emphasis added.) *Id.*

Although the trial court did not expressly grant summary judgment on this basis, this Court may do so since an appellate court may affirm on any basis it finds in the record for doing so. *Poe v. Hawaii Labor Relations Board, State of Hawaii,* 87 Hawaii 191, 197, 953 P.2d 569, 575 (1998); *Enos v. Pacific Transfer & Warehouse, Inc.,* 79 Hawaii 452, 459, 903 P.2d 1273, 1280 (1995).

D. There Is No Evidence Of Malice At The Initiation Of The Prior Proceeding.

The Appellant has simply produced no evidence to create a genuine issue of material fact concerning any malice on the part of any Appellee. As stated previously, this is one of the three elements of a cause of action for malicious prosecution. *Young v. Allstate Insurance Co., supra.* Malice must also be proven in

***25** In the lower court, Appellee Moriyama submitted sworn Declarations in support of each of the two motions for summary judgment that were filed by the Appellees. RA 19/175-194 and RA 21/42-65. In addition, he provided testimony to the lower court by his Declaration in support of Appellees' Memorandum In Reply to Appellant's Memorandum In Opposition to Appellees' second motion for summary judgment. RA 21/440-445.

A brief review of the highlights of those Declarations that are relevant to the issue of the existence or a lack of malice shows that the Appellees established that Appellee Moriyama did not act at any time with malice. Appellee Moriyama did not know the Appellant or any of the other members of the Wong/Fox scheme through any means other than the prior litigation. All of his acts and interactions with the Appellant were incident to his official duties as a staff attorney for the Office of Consumer Protection. RA 19/176-177. The only reason the Appellant was named in the OCP Complaint was because that investigation substantiated the allegations against him. RA 19/176.

Appellee Stephen H. Levins provides corroborative evidence on the issue of Appellee Moriyama's lack of malice in the Declarations he submitted to the trial court. RA 19/294-299 and RA 21/34. He testifies that Mr. Moriyama consulted with him throughout the investigation prior to the institution of the action in 2004. RA 19/296, ¶ 8. Based on Appellee Levins' observations, he believed that Appellee Moriyama always acted within the scope of his official duties in that prior proceeding. RA 19/297, ¶ 10.

At no time did Appellee Levins observe Appellee Moriyama express, or indicate in any way, that he was filing the action against the Appellant and others for any purposes other than to protect the consumers who he was statutorily required to protect as an attorney with the OCP. RA 19/297, ¶ 12. Nor did any of ***26** the consumers that Appellee Moriyama had contact with report to Appellee Levins that Appellee Moriyama appeared to be acting for any other purpose other than to help them and to enforce the law. RA 19/198, ¶ 13.

After the trial court granted only partial summary judgment and thereby caused the period of time after the initiation of the prior action to become ostensibly relevant, additional facts concerning Appellee Moriyama's lack of malice were presented. For example, Appellee Moriyama granted extensions of time to the Appellant to respond to the Complaint in the prior proceeding. The second such extension was given by Appellee Moriyama without the Appellant even having to ask. RA 21/49, 51, ¶¶ 22, 26.

Later, Appellee Moriyama agreed to set aside the default that had been entered after the Appellant failed to appear in the action. RA 21/52, ¶ 30. Appellee Moriyama agreed to continue the evidentiary hearing on the stipulated injunction for an indefinite length of time in exchange for the Appellant's agreement that the preliminary injunction against the Appellant would remain in effect. RA 21/60, ¶ 52.

Appellee Levins' Declaration in support of the Appellees' second motion for summary judgment provides additional information that supports the conclusion that Appellee Moriyama acted without malice before and after the initiation of that prior proceeding. For example, he testifies that after the case was filed, Appellee Moriyama continued to brief him and DCCA Director Recktenwald on the status of the case and at no time was Appellee Moriyama observed to be displaying any personal animus toward the Appellant. RA 21/37, ¶10.

Appellee Levins also spoke with the appointed mediator in that case. No inappropriate conduct by Appellee Moriyama was reported by mediator, retired Judge Amano. *Id.* at ¶ 11.

***27** The Appellant's memoranda in opposition to the two motions for summary judgment provide no relevant facts that create any question regarding Appellee Moriyama's lack of malice in instituting the prior proceeding against the Appellant. RA 19/347, RA 21/231. The Appellant simply failed to meet his burden of production as the nonmoving party faced with a motion for summary judgment. *Stanford Carr Dev. Corp. v. Unity House, Inc.*, 111 Hawai'i 286, 295-296, 141 P.3d 459, 468-469 (2006); *French v. Hawaii Pizza Hut, Inc.*, 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004).

This lack of malice also supports the application of the qualified immunity these government employees enjoy when performing their official duties. That is, unless the Appellant can show by clear and convincing evidence that these officials acted for an improper purpose with malice, they cannot be liable in their individual capacity. *Medeiros v. Kondo*, 55 Haw. 499, 522 P.2d 1269 (1974).

Summary judgment regarding this malicious prosecution allegation based upon a complete lack of evidence to support any of its three elements should be affirmed. The Appellant produced no evidence to create any genuine factual issues regarding a lack of probable cause, the existence of malice and that the prior proceedings were terminated in his favor.

E. The Appellees Owed No Duty In Tort To The Appellant.

The Appellant alleges that Appellee Moriyama negligently investigated the facts that supported the initiation of the prior proceeding. He claims that this was a "breach of DEFENDANTS' duty of care in the exercise of their statutory duty." Complaint ¶ 37, RA 19/20. In the trial court and in this Court, the Appellant claims this duty in tort should be implied from Haw. Rev. Stat. ¶ 487-1 because the Appellant claims he is a ***28** "legitimate business person." *Id. See* Opening Brief, p. 21, RA 34/27, and Appellant's Memorandum In Opposition to Motion For Summary Judgment, p. 17 at RA 19/363. The trial court rightly declined to imply a cause of action from this statute. Tr 3/2/2010, pp. 16, 30.

The Appellant cannot establish that the common law or the Legislature has somehow created a duty in tort owed by any of the Appellees to him. Without a duty, there is no cause of action for negligence. *Lee v. Corregedore*, 83 Haw. 154, 166, 925 P.2d 324, 336 (1996); *Ruf v. Honolulu Police Department*, 89 Haw. 315, 326, 972 P.2d 1081, 1092 (1999).

The existence, nature and extent of a legal duty in tort imposed by statute or by the common law is a question of law. *Namauu v. City and County of Honolulu*, 62 Haw. 358, 362, 614 P.2d 943, 946 (1980). As a question of law, it was appropriate for the trial court's determination within the context of Appellees' dispositive motions. *Pulawa v. GTE Hawaiian Tel*, 112 Hawaii 3, 143 P.3d 1205 (2006); *Taylor-Rice v. State*, 91 Hawaii 60, 71-72, 979 P.2d 1086, 1097-98 (1999).

In order for a statute to impose a duty and potential civil liability, it must provide expressly or by implication that violation of its requirements entails civil liability in tort. *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 91, 962 P.2d 344, 350 (1998); *Lee v. Corregedore*, 83 Haw. 154, 172, 925 P.2d 324, 342 (1996). Where a law does not contain an express provision for civil liability, "the Court is under no compulsion to accept it as [even] defining any standard of conduct for purposes of a tort action." Id. at 173, 925 P.2d 324, 343 (quoting Restatement (Second) of Torts § 286 comment d (1965). The issue is ultimately one of legislative intent. *Hulsman v. Hemmeter Development Corp.*, 65 Haw. 58, 67, 647 P.2d 713, 720 (1982)

***29** The limited holding of *Tseu ex rel. Hobbs v. Jeyte,* 88 Haw. 85, 90-92, 962 P.2d 344, 350-51 (1998) which the Appellant relies on, does not support the Appellant's contention that a duty in tort can be implied from Haw. Rev. Stat. § 487-1. The Hawaii Supreme Court in *Tseu* recognized that a tort claim against a governmental agency for negligent investigation may exist if the plaintiff can establish the existence of a specific duty in plaintiff's favor in either a statute or an administrative regulation having the force and effect of law.

In *Tseu,* the Civil Rights Commission failed to follow its own Hawaii Administrative Rule that required it to be cognizant of county building codes that would provide a valid reason for what might, at first blush, appear to be discriminatory conduct in housing. *See Tseu,* 88 Hawaii 85, 90-91, 962 P.2d 344 at 349-350 citing Hawaii Administrative Rule 12-46-301 *et seq.* Without considering the provisions of the Honolulu Housing Code which exculpated the defendant-landlord, the Hawaii Civil Rights Commission brought legal action against that defendant-landlord who had refused to rent a one bedroom cottage to a family of four. The *Tseu* court ruled that this duty to consider the Housing Code created a duty in favor of the landlord who would not have been the target of litigation had that agency followed its own mandate in that regard.

The present case is distinguishable from the facts in *Tseu.* Haw. Rev. Stat. § 487-1 expresses no purpose of imposing a specific duty on the Office of Consumer Protection or Appellees Levins or Moriyama, individually, to perform any act in favor of the Appellant. To interpret *Tseu* to say that the statutes and regulations that create and regulate the conduct of government agencies also give rise to private causes of action in tort against government agencies says too much. If this were the law, ***30** there would have been no reason in the *Tseu* decision for the Hawaii Supreme Court to reemphasize in its ruling on the motion for reconsideration that "the cause of action which may exist against the HCRC is based upon a duty to follow its own administrative regulations." *Id.* at 93, 962 P.2d at 352.

The Legislature has charged the Office of Consumer Protection with pursuing "a strong and effective consumer protection program to protect the interests of both the consumer public and the legitimate business person." HRS § 487-1. The Executive Director must "conduct investigations" and "shall enforce such laws and rules by bringing civil actions or proceedings." HRS § 487-5 (3) and (6).

To imply a tort duty on these Appellees in favor of the Appellant would compromise these mandatory statutory duties, undercutting the mission of the Office of Consumer Protection. *Howell v. United States,* 932 F.2d 915 (11th Cir. 1991)(No tort duty owed by FAA to airplane crash victims by reason of the agency's statutory duties.); *Green Acres Enterprises, Inc., et al. v. United States,* 418 F.3d 852 (8th Cir. 2005) (Because no "private analogue" in tort law to hold private individual liable, government cannot be held liable).

This is particularly true when the record establishes that the individual Appellees are attorneys duty bound to serve their client, the State of Hawaii. The common law litigation privilege applies to all lawyers involved in litigation in Hawaii. Hawaii's litigation privilege prohibits these Appellees from having any liability in this action. [10] *Matsuura v. E.I. Du Pont De Nemours & Co.,* 102 Hawaii 149, 73 P.3d 687 (2003).

***31** Unless there is fraud or malice involved in the prior proceeding, the litigation privilege applies to protect litigants and their attorneys from liability for their conduct in litigation in the event subsequent litigation is instituted. *Matsuura,* 102 Hawaii 149, 162, 73 P.3d at 700. This is particularly the case for government attorneys representing the government and the public interest in litigation. *Reed v. City and County of Honolulu,* 76 Haw. 219, 873 P.2d 98 (1994); *Botello v. Gammick,* 413 F.3d 971 (9th Cir. 2005)

The scope of any privilege is based upon policy considerations. *Matsuura,* 102 Hawaii at 156, 73 P.3d at 694. The policies referred to above regarding the Office of Consumer Protection and its staff having the freedom to zealously protect the public without fear of subsequent lawsuits could not be more central to the conclusion that there can be no duty owed by the Appellees to the Appellant.

Defendants Moriyama and Levins owed a duty to their client to initiate and pursue the prior litigation against the Appellant. The law does not allow a claim against those who have fulfilled their duty to their client in previous litigation to then be exposed to suits for alleged negligence and other wrongful conduct by their client's previous adversaries. *Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n. Inc.*, 2 Haw. App. 316, 321, 631 P.2d 600, 604 (1981) *rev'd on other grounds*, 65 Haw. 598, 655 P.2d 863 (1982).

In another circumstance, this Court remarked as follows regarding the litigation privilege which should apply in the present case: The absolute privilege is grounded on the important public policy of "securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."

***32** Restatement § 586 comment a. Thus, it not only protects attorneys in the pursuit of their profession, but also ensures the public's right to zealous legal representation. *McCarthy v. Yempuku*, 5 Haw. App. 45, 48 678 P.2d 11 at 14 (1984).

In *Matsuura*, the Hawaii Supreme Court quotes the Florida Supreme Court in *Levin, et al. v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994) for the rule that;

> Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct. *Levin*, 639 So.2d at 608.

In *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawaii 251, 151 P.3d 732 (2007), the Hawaii Supreme Court cited the Florida Court's *Levin* opinion for the general rule that absolute immunity must be afforded to any act or communication by an attorney during the course of a judicial proceeding. The only exception to that immunity is if a specific claim of malicious prosecution (previously discussed) can be established with extrinsic evidence. *Id.* at 268-269, 151 P.3d at 748-749.

There is no dispute that Defendant Moriyama acted as the litigation attorney for the State of Hawaii by its Office of Consumer Protection in Civil No. 04-1-1317-07 filed July 2004. There is no doubt that attorney Stephen Levins acted as Defendant Moriyama's supervising attorney in the fulfillment of the OCP Executive Director's statutory duties to pursue the goals of Haw. Rev. Stat. Chapter 487 through litigation. HRS § 487-5(6).

As a matter of law, there can be no liability for any of the Appellees' conduct incident to the prior litigation against the ***33** Appellant. There is simply no duty in tort owed to the Appellant, the Appellees' client's litigation adversary. *Myers v. Cohen*, 5 Haw. App. 232, 246, 687 P.2d 6, 16 (1984); *Smith v. Hurd*, 699 F.Supp. 1433, 1436 (D. Hawaii, 1988)(Hawaii courts do not recognize a cause of action for negligence by an opponent's attorney.)

For the rule of law to allow for a duty in favor of the attorney's client's adversary would create an unacceptable conflict of interest. "Not only would the adversary's interests interfere with the client's interests, the attorney's justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship." *Myers*, *supra*, citing *Friedman v. Dozorc*, 412 Mich. 1, 24, 312 N.W.2d 585, 591 (1981).

F. There Is Sufficient Information To Conclude That The Appellees Were Not Negligent.

Regardless of the lack of any legal duty to support the Appellant's negligence claims, the Appellees presented sufficient evidence in the trial court to justify summary judgment on those claims. The Appellant, on the other hand, failed to create any genuine questions of fact concerning the claims of negligent investigation by Moriyama or the negligent supervision and training claims directed at Appellee Levins and the State.

Appellee Moriyama testifies that he participated in the Office of Consumer Protection investigation for over two years before the action was filed in July 2004. When first assigned to the investigation, he reviewed the investigations that had already been ongoing by other offices within the Department of Commerce and Consumer Affairs prior to OCP's investigation.

Throughout the investigation and after litigation was instituted, he kept his superiors advised on the status of the case. In addition to his background as a certified public ***34** accountant, Appellee Moriyama attended an Estate Planning Seminar in 2002. He also informally consulted with estate planning attorneys and insurance agents to better understand deferred annuities. RA 19/175-194, ¶¶ 4, 6, 7, 9, 10, 18, 19, 21 and 22.

Appellee Levins also provided the trial court with admissible information to counter any allegations of negligent investigation by Moriyama and negligent supervision and training of Moriyama by him and the State. Of prime importance is the fact that Appellee Levins attests that Appellee Moriyama acted within the course and scope of his official duties in connection with the prior proceeding. Without proof that an employee acted outside of his authority, there can be no negligent supervision cause of action. *Dairy Road Partners v. Island Ins. Co.*, 92 Hawai'i 398, 427, 992 P.2d 93, 122, *reconsideration denied*, 92 Hawai'i 398, 992 P.2d 93 (2000). [11]

Appellee Levins also attests that Appellee Moriyama had been an attorney for ten years and a certified public accountant prior to that. Prior to working on the staff of the Office of Consumer Protection, Appellee Moriyama had worked in the Securities Enforcement Branch of the Department of Commerce and Consumer Affairs. Appellee Levins testifies that he encouraged his staff of attorneys, including Appellee Moriyama, to keep abreast of legal issues, subscribing to legal publications relevant to consumer protection. In fact, Appellee Moriyama did attend seminars concerning issues relevant to estate planning and insurance and securities matters. RA 19/294-299, ¶¶ 4, 5, 8, 10, 15, 16, 17 and 18.

The Appellant did not present any evidence to establish any genuine issues of material fact concerning these negligence ***35** allegations. As the nonmoving party, the Appellant failed in the trial court, and fails in this Court, to meet his burden of creating issues of fact which would warrant a trial. Summary judgment regarding all negligence claims should be affirmed.

CONCLUSION

The Judgment of the trial court should be affirmed with respect to the claims alleged against the Appellees. Pursuant to the Cross-Appeal, this matter should be remanded to the trial court for the sole purpose of awarding the costs that were denied by the trial court and amending the Judgment accordingly.

Footnotes

1 This discussion of the legal and factual merits is offered in this Statement of the Case in order to better explain the course of the proceedings below, i.e., why it was necessary to litigate two motions for summary judgment.

2 *See* footnote 4 on page 6 of Plaintiff's Memorandum In Opposition to Defendants' first Motion for Summary Judgment in which Appellant states "**Defendants Moriyama and Levins are not sued in their official capacity for malicious prosecution, and accordingly the exclusions under the State Tort Liability Act, HRS § 662-15(4) are not applicable.**" RA 19/352-353.

3 The third element of a cause of action for malicious prosecution, i.e., that the prior proceeding must have terminated in favor of the plaintiff, was not addressed in Appellees' first motion for summary judgment. *See* fn 3, p. 5 of Defendants Memorandum In Support of Motion For Summary Judgment, RA 19/159.

4 The Appellant's counsel conceded on the record at the hearing on Appellees' first motion that, **"[a]s to the negligent supervision claim, I think we would admit that Mr. Moriyama, at all times pertinent here, was acting within the scope of work."** *See* Tr 3/2/10, p. 24, lines 2-4. Since, it must be proven that the employee in question was acting outside the scope of his authority in order to prove the tort of negligent supervision, Appellant's counsel, in effect, conceded that they could not prove this claim. *Dairy Road*

Partners v. Island Ins. Co., 92 Hawai'i 398, 427, 992 P.2d 93, 122, reconsideration denied, 92 Hawai'i 398, 992 P.2d 93 (2000). No further argument is offered regarding this specific claim since this basis for summary judgment was conceded in the trial court.

5 The trial court held, as a matter of law, that no legal duty which would support the allegations of negligent investigation and negligent supervision could be implied from Haw. Rev. Stat. § 487-1. Tr 3/2/10, pp. 16, 30. That is the statute that the Appellant relies on to contend that there is an implied legal duty in tort owed to the Appellant. RA 19/363, RA 34/27. [FN6]

6 For the first time in this case, the Appellant in his Opening Brief also argues that Haw. Rev. Stat. § 487-1 also provides a standard of care by which Appellee Moriyama's conduct should be judged. *See* p. 23 of Appellant's Opening Brief, RA 34/29. Since this argument was not made in the trial court, it should not be considered by this Court. Rules App.Proc. Rule 28(b)(4); *Molinar v. Schweizer*, 95 Hawaii 331, 339, 22 P.3d 978, 986 (2001).

7 *See also* fn. 3 on p. 5 of the Appellant's Memorandum In Opposition To Motion For Summary Judgment in which the Appellant mentions that he also makes the accusation of malicious prosecution during the "maintenance" of an action in his Complaint. This mention is made immediately before the Appellant recognizes that Hawaii's definition of that tort limits the tort to wrongful *initiation* of litigation. RA 19/351.

8 H.A.R. § 16-38-7(b)(5) and (15); NASD Manual § 2310 Recommendations to Customers (Suitability).

9 The fact that Judge Marks denied Appellant's motion for summary judgment with respect to every allegation of the OCP Complaint that referred to him was brought to the trial court's attention at the hearing on Appellees' first motion for summary judgment. Tr. 3/2/2010, p. 12.

10 Because Appellees Levins and Moriyama have no liability based on the application of the litigation privilege to the prior litigation, their employer, State of Hawaii, has no vicarious liability for their litigation activities.

11 As stated previously, the Appellant conceded in the lower court that he had no evidence that Appellee Moriyama acted outside the bounds of his authority. *See* fn. 4, p. 6.

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